Filed 9/16/16 P. v. Fisher CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Appellant, v. MEGAN FISHER, Defendant and Respondent.	E064023 (Super.Ct.No. RIF1403733) OPINION

APPEAL from the Superior Court of Riverside County. Richard Todd Fields, Judge. Reversed and remanded with directions.

Michael A. Hestrin, District Attorney, Matt Reilly, Emily R. Hanks, and Donald W. Ostertag, Deputy District Attorneys, for Plaintiff and Appellant.

Steven L. Harmon, Public Defender, and Joshua A. Knight, Deputy Public Defender, for Defendant and Respondent.

The People appeal from the trial court's postjudgment order granting defendant Megan Fisher's petition to recall her felony sentence and strike her four one-year prior

prison term enhancements (Pen. Code, § 667.5, subd. (b))[1] pursuant to section 1170.18, added by the Safe Neighborhoods and Schools Act (Proposition 47).

The People contend the trial court committed reversible error by striking the four one-year prior prison term enhancements, because Proposition 47 is not retroactive, and, thus, the subsequent reclassification of the felony convictions underlying these enhancements as misdemeanors does not change the fact these convictions remained felonies for the purposes of the enhancements. The People also assert that the trial court erred when it struck the four prior prison terms because the enhancements are designed to punish defendants for their recidivist conduct. For the reasons explained below, we reverse the order striking the four one-year prior prison term enhancements pursuant to Proposition 47 and remand the matter with directions that the trial court vacate its order striking the four one-year prior prison term enhancements and resentence defendant.

I

FACTUAL AND PROCEDURAL BACKGROUND

On September 24, 2014, a felony complaint was filed charging defendant with two counts of receiving stolen property (§ 496, subd. (a); counts 1 & 2). The complaint further alleged that defendant had suffered four prior prison terms (§ 667.5, subd. (b)), to wit, a 2008 petty theft with priors (§ 666) conviction, a 2009 possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)) conviction, a 2010 possession of a

[1] All future statutory references are to the Penal Code unless otherwise stated.

controlled substance (Health & Saf. Code, § 11377, subd. (a)) conviction, and a 2013 possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)) conviction.

On November 4, 2014, voters enacted Proposition 47. It went into effect the next day. (Cal. Const., art. II, § 10, subd. (a).) As of its effective date, Proposition 47 classifies as misdemeanors certain drug- and theft-related offenses that previously were felonies or "wobblers," unless they were committed by certain ineligible defendants. (§ 1170.18, subd. (a).)

Proposition 47 also included a provision that allows certain offenders to seek resentencing. Defendants who are serving a sentence for a felony that would have been a misdemeanor had Proposition 47 been in effect at the time of the offense may file a petition for recall of sentence. (§ 1170.18.)

On March 5, 2015, the People filed an opposition to defendant's motion to dismiss the prior prison terms. The People argued defendant's prior prison terms qualified as prison priors despite the availability of relief under section 1170.18.

On April 15, 2015, defendant filed a motion to dismiss her prison priors and a reply to the People's opposition.[2] In the motion, defendant attached minute orders from

[2] In the motion, defendant attached a motion to dismiss or stay punishment on the prison priors in case No. RIF1404194, which was filed on February 11, 2015. Defendant asserted that the same arguments and exhibits apply to both of defendant's active felony cases, the current case (case No. RIF1403733) and case No. RIF1404194. The parties stipulated that "the priors on this case are the same priors argued in the motion in [case No.] RIF1404194." Following a hearing on the motion in case No. RIF1404194, on April 14, 2015, the trial court granted defendant's motion to dismiss the four one-year prior prison terms based on the fact defendant had been granted relief pursuant to Proposition 47.

the prior prison terms, noting that the priors had been reduced to misdemeanors on April 1 and 2, 2015, pursuant to section 1170.18.

On May 29, 2015, the parties stipulated that count 2 was a misdemeanor under section 1170.18. Defendant thereafter pled guilty to count 1, felony receiving stolen property, and count 2, misdemeanor receiving stolen property. The court granted defendant's motion to dismiss her four prior one-year prison terms pursuant to Proposition 47, and struck all of them. Defendant was thereafter sentenced to a split term of 13 months in county jail and 11 months on mandatory supervision under various terms and conditions.

On July 16, 2015, the People filed a timely notice of appeal.

II

DISCUSSION

The People argue the trial court erred when it struck defendant's prior prison terms because the enhancement is designed to punish defendants for their recidivist conduct and that the reduction of a prior felony conviction to a misdemeanor does not preclude imposition of a section 667.5, subdivision (b) enhancement based on that offense. The People further argue that the language of section 1170.18, subdivision (k), is not retroactive.

Defendant responds that based on the plain language of section 667.5, subdivision (b), a separate one-year term of imprisonment may only be imposed based on a prior conviction for a felony. As such, defendant maintains that once a felony has been

designated a misdemeanor "for all purposes" under section 1170.18, it is no longer "a felony" for any purpose, except that specified in section 1170.18. Defendant also claims that section 1170.18 applies retroactively.

Section 1170.18, subdivision (k), provides that: "Any felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) *shall be considered a misdemeanor for all purposes*," except for the right to own or possess firearms. (§ 1170.18, subd. (k), italics added.) To determine whether this provision applies to preclude the imposition of the prior prison term enhancement here, we apply the familiar rules of both statutory and initiative interpretation. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1099 (*Rivera*).) " ' "The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law. [Citations.]" ' [Citation.] In the case of a provision adopted by the voters, 'their intent governs.' [Citation.] [¶] 'In determining such intent, we begin with the language of the statute itself.' [Citation.] We look first to the words the voters used, giving them their usual and ordinary meaning. ' "If there is no ambiguity in the language of the statute, 'then . . . the plain meaning of the language governs.' " [Citation.] "But when the statutory language is ambiguous, 'the court may examine the context in which the language appears, adopting the construction that best harmonizes the statute internally and with related statutes.' " [Citation.] [¶] In construing a statute, we must also consider " 'the object to be achieved and the evil to be prevented by the legislation.' " [Citation.]' [Citation.] 'When legislation has been judicially construed and a subsequent statute on a

similar subject uses identical or substantially similar language, the usual presumption is that the Legislature [or the voters] intended the same construction, unless a contrary intent clearly appears.' " (*Id*. at pp. 1099-1100.)

The dispositive issue is whether reduction of a felony conviction underlying a one-year prior prison term to a misdemeanor pursuant to Proposition 47 thereby renders a nullity the one-year prior prison term enhancement based on such a felony-now-misdemeanor conviction. The emerging consensus among California appellate courts is that Proposition 47 does not apply retroactively to invalidate prior prison term enhancements imposed under section 667.5, subdivision (b). (*People v. Williams* (2016) 245 Cal.App.4th 458, 470, review granted May 11, 2016, S233539; *People v. Ruff* (2016) 244 Cal.App.4th 935, 943-949, review granted May 11, 2016, S233201.) Our Supreme Court has granted review to resolve the issue. (*People v. Valenzuela* (2016) 244 Cal.App.4th 692, review granted Mar. 30, 2016, S232900; *People v. Carrea* (2016) 244 Cal.App.4th 966, review granted Apr. 27, 2016, S233011.)

The language " 'misdemeanor for all purposes' " is very close to language from section 17 regarding the reduction of wobblers to misdemeanors.[3] However, this language is not necessarily conclusive. (*People v. Park* (2013) 56 Cal.4th 782, 793-794 (*Park*).) It has not been read to mean a defendant could avoid a sentence enhancement by

[3] Section 17, subdivision (b), states in pertinent part: "When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170, or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances . . . ."

having the prior offense reduced to a misdemeanor after he or she committed and was convicted of the present crimes. (*Id*. at p. 802.) The question is one of timing. We agree that the designation does not apply retroactively in this context. Defendant has presented no persuasive reason why we should find differently. (See *People v. Gipson* (2013) 213 Cal.App.4th 1523, 1529 [in the absence of "good reason to disagree," we "typically follow the decisions of other appellate districts or divisions"].)

In the context of felony jurisdiction over criminal appeals, *Rivera*, *supra*, 233 Cal.App.4th 1085, held that section 1170.18, subdivision (k), should be interpreted in the same way as section 17—rendering the offense a misdemeanor *going forward* from the date the trial court reduced it, but not retroactively. (*Rivera*, *supra*, at pp. 1095, 1100; see *People v. Moomey* (2011) 194 Cal.App.4th 850, 857 [rejecting assertion that assisting a second degree burglary after the fact does not establish the necessary element of the commission of an underlying felony because the offense is a wobbler: "Even if the perpetrator was subsequently convicted and given a misdemeanor sentence, the misdemeanant status would not be given retroactive effect"].) After careful consideration, we see no reason to depart from *Rivera*. Although *Rivera* addressed section 1170.18, subdivision (k), in a different context, its analysis of section 1170.18, subdivision (k), is equally relevant here.

Nothing in the language of section 1170.18 or the ballot materials reflect such an intent. (*Rivera*, *supra*, 233 Cal.App.4th at p. 1100.) The statute's remedial provisions apply only to cases in which a person is currently serving a sentence for a conviction of a

felony that is now a misdemeanor (§ 1170.18, subd. (a)), and those cases in which a person convicted of such a crime has already completed his or her sentence (§ 1170.18, subd. (f)). Moreover, the statute goes on to instruct that "[n]othing in this and related sections is intended to diminish or abrogate the finality of judgments in any case not falling within the purview of this act." (§ 1170.18, subd. (n).) The section 667.5, subdivision (b) enhancements at issue here are part of such a judgment.

Defendant relies primarily on *Park*, *supra*, 56 Cal.4th 782 and *People v. Flores* (1979) 92 Cal.App.3d 461 (*Flores*). In *Park*, the Supreme Court held the defendant's sentence could not be enhanced under section 667, subdivision (a), because the past felony conviction had been reduced to a misdemeanor pursuant to section 17, subdivision (b), before the commission of the instant offense. (*Park*, *supra*, at p. 798.) It stated: "[W]hen a wobbler is reduced to a misdemeanor in accordance with the statutory procedures, the offense thereafter is deemed a 'misdemeanor for all purposes,' except when the Legislature has specifically directed otherwise." (*Id*. at p. 795.) Here, defendant committed his current felonies before his prior convictions could be reduced to a misdemeanor, and Proposition 47 directs no differently than section 17. This distinction between retroactive and prospective application was recognized by the Supreme Court in *Park*: "There is no dispute that, under the rule in [prior California Supreme Court] cases, [the] defendant would be subject to the section 667[, subdivision] (a) enhancement had he committed and been convicted of the present crimes before the

court reduced the earlier offense to a misdemeanor." (*Park*, *supra*, at p. 802.) Thus, defendant's reliance on *Park* is misplaced.

Defendant's reliance on *Flores* fails for the same reasons. In *Flores*, the defendant was sentenced to prison following his conviction for selling heroin (Health & Saf. Code, § 11352), and his state prison sentence was enhanced by one year under Penal Code section 667.5. (*Flores*, *supra*, 92 Cal.App.3d at pp. 464, 470.) The enhancement was based on a prior felony conviction for possession of marijuana under Health and Safety Code section 11357. (*Flores*, at p. 470.) Before the defendant was convicted of selling heroin, the Legislature had reduced the crime of possession of marijuana to a misdemeanor. (*Id*. at p. 471.) The *Flores* court found the new laws constituted "a legislative declaration that the old laws were too severe for the quantum of guilt involved" (*id*. at p. 473), and distinguished a situation in which the California Supreme Court refused to give retroactive effect to an amendment to section 17 (*Flores*, *supra*, at p. 473) in part because "[t]here was no suggestion there, as there is here, that the Legislature intended retroactive application" (*id*. at p. 474). In *Flores*, as in *Park*, and in contrast to the present case, there is no dispute that defendant's prior convictions were reduced to misdemeanors *after* she committed the current offenses. Moreover, Proposition 47 contains no clear expression with respect to retroactivity as was found in *Flores*.

Further, the qualifying criterion for the enhancement that defendant received under section 667.5, subdivision (b), is having served a prior prison term for a felony

conviction. (§ 667.5, subd. (b) ["The court shall impose a one-year term for each prior separate prison term or county jail term imposed under subdivision (h) of Section 1170 or when sentence is not suspended for any felony . . ."].) A section 667.5 enhancement is based on the defendant's status as a recidivist, not on the underlying criminal conduct. (*People v. Gokey* (1998) 62 Cal.App.4th 932, 936 ["Sentence enhancements for prior prison terms are based on the defendant's status as a recidivist, and not on the underlying criminal conduct, or the act or omission, giving rise to the current conviction."].) Separate punishments for a felony and for a penalty enhancement are appropriate, because the punishments serve different purposes, where the enhancement deters similar future conduct. (*People v. Walker* (2002) 29 Cal.4th 577, 583.)

The one-year prior prison term enhancement (§ 667.5, subd. (b)) is "an enhancement available for 'any felony' if the felon served time in prison for 'any felony' and showed an inability to reform."[4] (*People v. Jones* (1993) 5 Cal.4th 1142, 1150.) The service of a prison term component of this enhancement is thus tied directly to the felon's conviction of a felony. That, subsequent to such service, the felony conviction is

---

[4] In relevant part, section 667.5, subdivision (b), provides: "[W]here the new offense is any felony for which a prison sentence or a sentence of imprisonment in a county jail under subdivision (h) of Section 1170 is imposed or is not suspended, in addition and consecutive to any other sentence therefor, the court shall impose a one-year term for each prior separate prison term or county jail term imposed under subdivision (h) of Section 1170 or when sentence is not suspended for any felony; provided that no additional term shall be imposed under this subdivision . . . prior to a period of five years in which the defendant remained free of both the commission of an offense which results in a felony conviction, and prison custody or the imposition of a term of jail custody imposed under subdivision (h) of Section 1170 or any felony sentence that is not suspended."

reclassified as a misdemeanor does not, without more, alter this determinative factor. And there is nothing more. Proposition 47 is not retroactive. That Proposition 47 deems a particular felony conviction "a misdemeanor for all purposes" (§ 1170.18, subd. (k)) therefore does not signify that such misdemeanor designation relates, or reaches, back to substitute, as a misdemeanor, the felony status of the conviction in a one-year prior prison term enhancement (§ 667.5, subd. (b)).

Based on the foregoing, the trial court erred in striking the four one-year prior prison term offenses pursuant to Proposition 47.

III

DISPOSITION

The order appealed from is reversed. The matter is remanded to the Superior Court of Riverside County with directions to the trial court to vacate its order striking the four one-year prior prison term enhancements (§ 667.5, subd. (b)) and to resentence defendant in accordance with this opinion. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

McKINSTER
J.

MILLER
J.